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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

ANTHONY T. EASTON)

WT Docket No. 97-199)

To: The Commission

MOTION TO STRIKE COMMENTS
OR FOR LEAVE TO FILE RESPONSE

Anthony T. Easton, by his attorneys, hereby moves the Commission to strike the "comments" filed by ClearComm, L.P. ("ClearComm") in this proceeding. See Comments of ClearComm, L.P. (Nov. 14, 1997) ("Comments"). In the alternative, Mr. Easton requests leave to file the responsive pleading submitted simultaneously herewith.

1. ClearComm claims that its arguments pertain to the order of Administrative Law Judge Steinberg certifying this case to the Commission. See Comments at 1 & n.1. However, ClearComm did not address the issues presented to the Commission by the actions taken by Judge Steinberg under 47 C.F.R. § 1.92(c). Those issues relate to "the matters specified in the order to show cause" issued to Mr. Easton. 47 C.F.R. § 1.92(d). Rather than commenting on Judge Steinberg's order, ClearComm opposed Mr. Easton's October 6, 1997 petition for reconsideration, and specifically asked the Commission to "summarily dismiss or deny Mr. Easton's petition." Comments at 4, 16.

2. In view of its request for relief, ClearComm has filed an untimely opposition to Mr. Easton's petition for reconsideration. However, ClearComm did not explain why it did not oppose Mr. Easton's petition by the October 24, 1997 deadline. Moreover, it made no attempt to show good cause for the acceptance of its late-filed

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opposition. Thus, the pleading should be stricken (or dismissed) on the grounds that it was late-filed. See *Clifford Stanton Heinz Trust*, 11 FCC Rcd 5354, 5357-58 (Com. Car. Bur. 1996).

3. In substance, ClearComm's pleading can be considered a response by a non-party to Mr. Easton's reply to the opposition filed by the Wireless Telecommunications Bureau to his petition for reconsideration. The bulk of ClearComm's substantive comments are directed to arguments made by Mr. Easton only in his reply pleading, see Comments at 4-7, 9-13, and ClearComm cites to that pleading repeatedly, see *id.* at 5 nn.13, 14, 9 n.11, 11 n.38.

4. A response to a reply pleading can be filed only if specifically requested or authorized by the Commission. 47 C.F.R. § 1.45(c). ClearComm's comments were neither requested nor authorized by the Commission. Consequently, the pleading may also be stricken (or disregarded) as unauthorized and in the interests of maintaining orderliness and predictability in this case. See *Llerandi v. FCC*, 863 F.2d 79, 87 (D.C. Cir. 1988).

5. The Commission should reject ClearComm's claim to "standing" based on its alleged status as an intervenor in the hearing before Judge Steinberg. See Comments at 3 n.7. In the first place, ClearComm does not need "standing" to oppose Mr. Easton's petition for reconsideration. It needed only to file an opposition to the petition in a timely fashion. ClearComm failed to do so and forfeited its opportunity to become a party in this proceeding.

6. The filing of a petition to intervene with Judge Steinberg on November 13, 1997 did not afford ClearComm any "standing" to file

its Comments with the Commission the next day. Judge Steinberg terminated the hearing proceeding with respect to Mr. Easton. See *Westel Samoa, Inc. v. FCC*, FCC 97-172, at 2 (Oct. 20, 1997). Moreover, the fact that ClearComm may show that it is a party in interest with respect to the applications of Westel Samoa, Inc. and Westel, L.P. does not make it a party in this case or excuse its late-filing. Thus, ClearComm's status before Judge Steinberg has no bearing on its status in this proceeding. In any event, the mere filing of a motion to intervene did not make ClearComm an "intervenor" or a party in the hearing.

7. Party status can only be conferred on ClearComm by Judge Steinberg, and he has yet to act on ClearComm's petition to intervene. And, obviously, the Commission's ex parte rules do not confer party status.

8. Mr. Easton questions how ClearComm can claim to be a party to the *Westel Samoa* hearing under the "explicit terms" of 47 C.F.R. § 1.1202(d). Comments at 3 n.7. That provision defines "party" for the purposes of the Commission's ex parte rules set forth in Subpart H of Part 1 of its rules. See 47 C.F.R. § 1.1202(d), Note 3. The Commission was explicit when it promulgated the new definition of party "that identifying a person as a 'party' for purposes of the ex parte rules does not constitute a determination that such person has satisfied any other legal or procedural requirements (e.g., timeliness or standing) to be a party for other purposes." *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, 12 FCC Rcd 7348, 7354 (1997). Clearly,

47 C.F.R. § 1.1202(d) cannot confer "party status" on ClearComm until Judge Steinberg acts on its petition to intervene. Comments at 3 n.7.

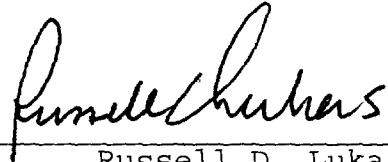
9. In effect, ClearComm (a non-party) is attempting to do what the Bureau (a party) could not -- respond to Mr. Easton's reply pleading. Acceptance of ClearComm's Comments under these circumstances would sanction an end run around the Commission's pleading rules. Moreover, such action would add to the procedural irregularities that have marked this case. That being the case, Mr. Easton respectfully suggests that the best course of action would be for the Commission to summarily dismiss the Comments. However, if the Commission chooses to consider the pleading on its merits, Mr. Easton respectfully requests that the Commission also consider his Response to Comments of ClearComm, L.P. ("Response") submitted herewith.

10. The Commission clearly has the discretion to grant Mr. Easton leave to present his Response. See 47 C.F.R. § 1.45(c); *Meredith Corp. v. FCC*, 809 F.2d 863, 869 (D.C. Cir. 1987). Good cause exists for the exercise of that discretion here, because fairness dictates that Mr. Easton have the opportunity to respond to ClearComm's arguments. Indeed, as the petitioner, Mr. Easton should be allowed to have the last word on the subject. And consideration of his Response would serve the public interest by giving the Commission the benefit of an adversarial discussion of the matters raised by ClearComm. That should conduce to the proper resolution of the issues before the Commission in this case.

For all the foregoing reasons, Mr. Easton respectfully requests the Commission to strike or dismiss the Comments or, in the alternative, to accept and consider his Response.

Respectfully submitted,

ANTHONY T. EASTON

By 

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December 4, 1997

CERTIFICATE OF SERVICE

I, Katherine A. Baer, a secretary in the law offices of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 4th day of December, 1997, sent by first class United States mail, copies of the foregoing MOTION TO STRIKE COMMENTS OR FOR LEAVE TO FILE RESPONSE to the following:

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